United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1345

B

P/5

United States Court of Appeals

For the Second Circuit

Index No. 68 Civ. 2049 (CMM)

LA FORTUNE, Substituted for JONES & MCKNIGHT, INC.,

Plaintiff-Appellant,

—against—

S.S. IRISH LARCH, her engines, etc., IRISH SHIPPING, LTD., CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.

Defendants,

—and—

IRISH SHIPPING, LTD.,

Defendant and Third-Party Plaintiff-Appellee,

—against—

CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.,

Third Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT LA FORTUNE

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Plaintiff-Appellant
161 William Street
New York, New York 10038
964-3553

TABLE OF CONTENTS

CASES CITED

OTHER AHTHORITIES

United States Court of Appeals

For the Second Circuit

Index No. 68 Civ. 2049 (CMM)

LA FORTUNE, Substituted for JONES & MCKNIGHT, INC.,

Plaintiff-Appellant,

—against—

S.S. IRISH LARCH, her engines, etc., IRISH SHIPPING, LTD., CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.

Defendants,

—and—

IRISH SHIPPING, LTD.,

Defendant and Third-Party Plaintiff-Appellee,

—against—

CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.,

Third Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT LA FORTUNE

Statement

The brief of defendant-appellee Irish Shipping Ltd. does not meet the contentions raised by appellant that (1) there was no evidence that the shipper knowingly mis-

described the shipment as the Court below found; (2) in any event, that Court did not find that the alleged mis-description was fraudulent for purposes of the exonerating provisions in 46 U.S.C. § 1304(5) (Opinion No. 401.53; 9a, 10a, 11a); and (3) the finding of the trial court of insufficiency of packaging was clearly erroneous and not supported by any evidence in the record.

POINT I

There was no proof that it was the shipper who prepared the bill of lading containing the alleged mis-description.

In an effort to carry its burden of proof on the issue of mis-description, the carrier attempted to show that the shipper prepared the carrier's bill of lading by citing the legend in its own printed form bill of lading "Shipper's Description of the Goods" (142a), and the testimony of carrier's expert, Mr. Peter Siebel, Jr., as to the custom in the liner trade (125a-126a), characterizing them as falling within the principals of *Hellenic Lines, Ltd.* v. *Director General of India Supply Mission* (2d Cir. 1971), 452 F.2d 810, 814. However, in that case there was testimony which went to the heart of the contract in question and the intent of the parties thereto. At page 814, the Court said:

> "A witness who had participated in the negotiations testified that the appellant undertook 'the risk of waiting for the rotation in turn . . . in accordance with the [Bombay] customs. . . .' Given the evidence in the record both as to the intent of the parties and the custom of the port of Bombay, . . . , the district court's finding that 'berth' and 'berth terms' meant a shoreside berth is not clearly erroneous."

Here, the carrier has not produced any evidence, testimony or otherwise, as to the intent of the parties concerning the preparation of the bill of lading and it ignores COGSA, Section 1303(a), (b) and (c), which mandates that it is carrier's obligation to issue to the shipper a bill of lading covering the goods shipped.

The absence of proof showing that it was the shipper who mis-described the cargo, and further that the shipper did so knowingly and fraudulently constituted a failure on the part of the carrier to carry its burden of proving that the damage was occasioned by one of the excepted causes in 46 U.S.C. § 1304. *Nichimen Co.* v. *M.V. Farland* (2d Cir. 1972), 426 F. 2d 319.

To put it succinctly, the finding of the shipper having knowingly mis-described the goods is clearly erroneous. *McAllister* v. *United States* (1954) 348 U.S. 19, 99 L. ed. 20. The determination that the damage was from an excepted cause is legally insufficient for the reason that the trial court did not find that the shipper *fraudulently* mis-described the goods in question.

POINT II

Defendant-Appellee failed to prove that the damage resulted from insufficiency of packaging of the cargo but instead proved that the shipment was satisfactorily packaged.

Under the law, once the plaintiff has established its *prima facie* case, the carrier has the burden of proving that the damage to the shipment was not due to their negligence or that it was occasioned by one of the excepted causes of 46 U.S.C. § 1300 *et seq.* *Nichimen Co.* v. *M.V. Farland* (2d Cir. 1972), 426 F.2d 319. Although the Court below found that the carrier had met its burden as to the

proof of insufficiency of packaging, an examination of the trial record discloses that there was no evidence to support such a finding. Lindstrom, the carrier's witness, testified that in his opinion the bands that he saw on the coils were insufficient (89a, 90a), and that those bands were put there by his employer as part of the recoopering and rebanding of the damaged coils after discharge but before delivery (98a, 108a, 109a, 111a). Defendant's expert, Siebel, agreed with Lindstrom that these bands were insufficient. Siebel's testimony was based on the mistaken belief that the shipper rather than the carrier, by its terminal operator, had supplied the bands.

An expert's testimony should be excluded where the facts upon which his opinion was based were not warranted by the record. *Atlantic Mutual Insurance Co.* v. *Lavino Shipping Co.* (3rd Cir. 1971), 441 F.2d 473. This Circuit has held that when all material facts are not given to an expert, his answers are meaningless. *Gerber* v. *Sabine Howaldt* (2d Cir. 1971), 437 F.2d 580, 594.

In contrast to the speculation offered by the carrier, plaintiff-appellant offered the testimony of its cargo surveyor, Mr. Melvin J. Juric, and his survey report (Plaintiff's Exhibit 5, 149a). That report attested to Mr. Juric's opinion that the packaging was sufficient. Juric's testimony concerned the bands provided by the shipper which bands were still in tact.

It should be noted that a surveyor employed by the carrier also examined the bands on the coils *before* they were recoopered and rebanded (Plaintiff's Exhibit 6, 151a). His written report which was admitted into evidence (75a) noted damage to the coils while they were still on board the SS IRISH LARCH and he attributed the damage he found to improper stowage. He found no fault with their packaging. In fact, he said it was "generally satisfactory".

The Court's finding of insufficiency of packaging was, therefore, clearly erroneous as the record is devoid of credible supporting evidence. *McAllister* v. *United States*, *supra*. On the other hand, there is convincing evidence in the trial record which would affirmatively support a finding that packaging was proper in all respects.

POINT III

The damage to the subject shipment occurred while it was in the care, custody and control of Irish Shipping Ltd., its management, employees and others acting for it.

It has not been disputed that the entire shipment was delivered to the ocean carrier in good order and condition at Antwerp and that the master issued and signed a clean bill of lading for its receipt on board the SS IRISH LARCH (Plaintiff's Exhibit 2, 143a).

Nor has it been disputed that the shipment arrived at Chicago in a damaged state (Plaintiff's Exhibit 5, 149a). In fact, the carrier's own records disclosed that the shipment was damaged while still aboard the vessel and prior to the discharging operations (Plaintiff's Exhibit 6, 151a). At all times subsequent to their delivery to the vessel, the coils which were damaged were in the care, custody and control of the ocean carrier, its management, employees and others acting for it (42a, 69a). The extent of the damage inflicted upon the shipment was clearly shown as evidenced by the record of the Court below (Plaintiff's Exhibit 1, 141a; Plaintiff's Exhibit 5, 149a; 50a thru 53a; 93a, 94a; 132a thru 134a).

The carrier's reference to the SS BROOKLYN MARU (D.C. Md. 1972), 72 A.M.C. 2548, is totally inappropriate. The only resemblance that case bears to the instant matter is that both involved shipments of steel. In the SS

BROOKLYN MARU, there was delivery of the cargo, under clean receipts, to the consignee's truckman. Here, we have no such delivery for, at all times, the damaged cargo remained in the custody of the vessel and/or the terminal operators. In the SS BROOKLYN MARU, the damage was not discovered until it was transported to the consignee's premises. Here, the damage was noted while the coils were still aboard the vessel and the carrier's surveyor attributed it to improper stowage, not insufficiency of packing. Clearly, the rights and responsibilities of the parties are different here than from that found by the Court in the SS BROOKLYN MARU.

Concerning the economic injury sustained as a result of damage to the coils, the carrier cites: *The St. Johns N.F.* (1923) 263 U.S. 119, 44 S. Ct. 30, 68 L. ed. 201. We are in complete accord with the utilization of the holding in that case as a precedent here. However, we respectfully request the Court to refer to page 125 where that Court stated:

> "Generally, the measure of damage for loss of goods by a carrier when liable therefor is their value at the destination to which it undertook to carry them."

It is submitted that the aforementioned holding is most appropriate. The ocean carrier here undertook to transport the cargo to Chicago, the shipper's market, and there to deliver it in like good order and condition as received at the port of loading. The value of the coils rendered totally lost because of damage was that which would have been paid by Jones & McKnight, the shipper's market, had they been delivered in tact.

Clearly, the plaintiff-appellant met its burden of proof by an uncontradicted showing of good order and condition of the shipment upon delivery to the ocean carrier, the

damaged condition of 131 coils before re-delivery at Chicago, and the value of the damage thus sustained.

Juric testified that the damaged coils were a total loss (50a, 53a), and the carrier's witness, Lindstrom, testified that he could not sell it after his employer recoopered and rebanded it for easy handling (93a, 94a).

It was then carrier's burden to prove that the damage was not due to their negligence, or that it was occasioned by one of the excepted causes in Section 1304(2) of COGSA. *Nichimen Co.* v. *M. V. Farland* (2d Cir. 1972) 426 F.2d 319, a burden which it clearly failed to carry.

POINT IV

At all times here relevant, Irish Shipping Ltd., its management, employees and others acting for it had knowledge of damage to the shipment.

Plaintiff's Exhibit 6 (151a), the hatch survey from the carrier's files, noted that the shipment was in a damaged state while it was still on board the SS IRISH LARCH. At the time of that survey, its surveyor found no fault with the packing of the coils but rather excepted to the improper stowage of the coils. This constitutes an admission against interest by the ocean carrier that the coils were sufficiently packed and were improperly stowed. *United States* v. *Lykes Bros. Steamship Co.* (5th Cir. 1970), 432 F.2d 1076; *Compagnie De Navigation, Etc.*, v. *Mondial United Corp.* (5th Cir. 1963), 316 F.2d 163, n. 10, 171. It further establishes that the carrier, its management, agents, employees and/or others acting for it had knowledge of the damaged state of the coils which were still on board the ship.

On June 8th, 1967, the shipper gave written notice of the damage to the shipment to the "Master and/or Agent and/or Owner of the SS IRISH LARCH" (Defendant's Exhibit B, 155a). It is abundantly clear that the carrier knew of the damage before discharge of the vessel by virtue of what its surveyor knew and the shipper's written notice. At all times, the damaged coils remained in its care, custody and control by its management, employees, agents or others acting in its behalf.

Appellee's belated argument on this appeal that the Court below should have granted its motion to dismiss for failure to prosecute suggests the weakness of that contention. The motion papers were not included in the Appendix on this appeal for the reason that after appellant submitted its proposed Issues on Appeal appellee did not indicate that it wished also to rehash the arguments heard below which resulted in the denial of its motion.

Appellee contends that it could not adequately prepare its case. It is ironic though, that in urging its misdescription argument, appellee relies upon the testimony of Miss Walker, an employee of the charterer's agent. Miss Walker was subpoenaed to testify by the appellant and not by the appellee. It is obvious that she could have been called upon to testify by appellee either through a voluntary appearance or a subpoena but appellee chose not to call her. The shipowner claims it was prejudiced in the presentation of its defense. Its failure to call a witness who was available, and who appellee claims supports its position, suggests inattentativeness rather than prejudice in the preparation of that defense.

CONCLUSION

The decision of the Court below dismissing plaintiff's complaint and granting judgment for the defendants against the plaintiff should be reversed, and judgment should be granted to the plaintiff against the defendants in the sum of $8,222.34, plus interest and costs.

Respectfully submitted,

DONOVAN, DONOVAN, MALOOF & WALSH
Attorneys for Plaintiff-Appellant

CHARLES C. GOODENOUGH,
Of Counsel

78 LEE PRINTING COMPANY, INC., 421 HUDSON ST., N.Y. 10014—691-2300